IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

J U D G M E N T

Chandan Singh Vs. Devaram Kumawat
S.B. CIVIL FIRST APPEAL NO.680/2005

Against judgment and decree dated 25.11.2005 passed by Addl. District Judge (Fast Track) No.1, Pali in Civil Original Suit No. 44/2005 - Devaram Kumawat Vs. Chandan Singh.

DATE OF JUDGMENT: 11th May,2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. Anil Bhandari for appellant.
Mt. Rakesh Ramawat for respondent.

This appeal by defendant under Sec.96 of the Civil Procedure Code challenges the judgment and decree dated 25.11.2005 passed by Addl. District Judge (Fast Track) No.1, Pali in Civil Original Suit No. 44/2005 (Devaram Kumawat Vs. Chandan Singh) rejecting the application of defendant filed under Order 37 Rule 3(5) CPC and decreeing the suit for recovery of Rs.55,000/- with interest @ 6% per annum.

The plaintiff-respondent filed the suit for recovery against defendant-appellant under Order 37, CPC inter-alia stating that machineries and other items worth Rs.1,75,000/- were sold to his proprietorship firm M/s. Kiran Cement Industries by the defendant and concerning that deal an agreement was executed by defendant Chandansingh on 07.04.2003 to that effect but as the defendant required those items again, he repurchased the same at the cost of Rs.175,000/- from the plaintiff and in lieu thereof issued four cheques in favour of plaintiff Deva Ram, however, on presentation of one of the cheques for collection on 01.01.2005 for an amount of Rs.55,000/-, the same was returned unpaid on account of insufficient funds in the account of the defendant. The plaintiff further stated in the plaint that a legal notice was sent to the defendant on 19.01.2005 demanding payment of the dishonoured cheque amounting to Rs.55,000 but it was not made to him and thereby the defendant deliberately and mischievously cheated him. The

plaintiff, in addition to other prayers, made prayer for decreeing the suit against defendant for the said amount and interest thereon.

The case, as has been set up by the appellant-defendant in the present appeal, is that the trial Court issued summons of the suit but as he was out of station, same could not be served upon him and he came to know of it only when he returned back that on 16.05.2005 the Process Server of the Court came with notice and thereafter he immediately inquired into the matter and moved an application under Order 37 Rule 3(5) CPC praying for leave to defend the suit to which reply was by filed by the plaintiff on 09.08.2005 contending that the defendant had not complied with the provisions of Order 37 Rule 3(1) CPC, and thereafter the learned trial Court after hearing the parties on 25.11.2005 rejected the application and decreed the suit for recovery.

The reply to the application, filed by defendant under Order 37 Rule 3(5) before the

learned trial Court, denies the averments made by the plaintiff in the application for defending the suit and states that payment against the defendant still remains due and the defendant only with a view to prolong the proceedings by filing such an application is abusing the process of the court so the application be rejected. The plaintiff also denied the plea of alibi taken by defendant and stated that he is running the factory in village Gudiya under the name and style of Kiran Cement Factory and as after service of the summons the defendant has not complied with the provisions of Order 37 Rule 3(1) CPC and caused undue delay in the proceedings, as such the application for permission to defend is liable to be rejected. The plaintiff further averred that by disturbing and harassing the plaintiff, the intention of the defendant is not to make the payment.

The plaintiff also filed written arguments in respect of the said application of the defendant, inter-alia stating that Process Server Kamal Joshi served the defendant on 27.04.2005 in

accordance with the provisions of Order 5 Rule 17, which legally amounted to complete service and to that effect the report of the Process Server is available on record. It was also stated that as the defendant after service on 27.04.2005 did not appear before the Court in person or through his Advocate within 10 days thereof, nor did he file his address in the Court within the said period but appeared before the Court only on 17.05.2005 after a delay of 9 days, as such, he did not comply the provisions of Order 37 so cannot be permitted to defend his case. It was also averred that though the defendant accepts the dealing between plaintiff and the defendant but has not produced any such document before the Court to show that the payment of the amount was made rather the defendant in his application confirms the dealing. According to the plaintiff, the plea of the defendant that notice was not served on him was strange and contradictory because he had presented himself in the Court on the date fixed and if he would not have been served then how he could present himself in the Court on that day?

The learned trial Court, in its order dated 25.11.2005 passed on the application filed by the defendant under Order 37 Rule 5 disowned the plea of the defendant that the cheques in question were bad or that he did not owe the sum to the plaintiff and that he was out of station and came to know about summons only on 16.05.2005. The trial Court found that the Process Server in his report dated 27.04.2005 scribed that on the address mentioned on the summons the defendant was not found and the wife of defendant and the son who were available at the place refused to accept the summons and the persons present there denied to become motbirs and stated that defendant Chandansingh is a person of criminal nature and refused to verify the affixing of the summon at the house of defendant. The trial Court, found the defendant at fault and dismissed the application and decreed the suit, as aforesaid.

The contention of the learned counsel for

the appellant is that the trial Court has failed to appreciate that infact there was no proper service on the defendant in this case and he appeared in the Court within 10 days from the date of knowledge of the summons issued by the Court, therefore, the trial Court has committed error of law considering non-compliance of the provisions of Order 37 Rule 5 CPC and wrongly rejected the application for grant of leave to defend the suit. It has also been submitted that in the application under Order 37 Rule 5 of the CPC, the defendant stated that there was no amount due of the plaintiff against the defendant and therefore in the circumstances leave to defend was required to be granted.

On the other hand, it has been contended that in the instant case the learned trial Court after taking into consideration that the defendant's wife and other persons residing in the house refused to accept the summons for judgment and being satisfied with the Process Server's report filed alongwith his affidavit, considered the service to be complete in the case. It has

also been contended that the defendant-appellant in the application moved under Order 37 Rule 5 of the CPC has admitted this position that there was business transaction between the plaintiff and the defendant and simply a total denial has been made in relation to the cheque issued by the defendant to the plaintiff, which was dishonoured subsequently. According to the learned counsel, in view of above, there is no substantial defence raised in the application and infact the defendant-appellant wanted to delay the matter on the basis of a totally false averment that nothing was due against the defendant as was asked by the plaintiff in the plaint.

I have heard learned counsel for the parties and perused the material available on record.

In the present appeal, the point which requires consideration is as to whether the learned trial Court has rightly refused the defendant-appellant the leave to defend suit?

It is to be seen that the learned trial Court has rejected the leave to defend to the defendant-appellant noticing that despite proper service of summons for judgment, the wife and sons of the defendant-appellant who received the copy of plaint and summons for judgment, declined to sign the receipt for same. The service was effected by applying the mode which is provided under the provisions of Order 5 Rule 17 CPC. The trial Court took into consideration the report of the Process Server which was filed alongwith his affidavit. The application moved under Order 37 Rule 5 CPC was rejected for the reason that the business dealings with the plaintiff was not denied by the defendant and the Cheque issued by the defendant for a sum of Rs.55,000 was dishonoured by the Bank. The trial Court came to the conclusion that no reasonable or bonafide defence was available to the defendant. With regard to the contention of the learned counsel about improper service, it is suffice to make a mention here that the trial Court by a

reasoned order has considered the service on defendant proper.

In the instant case, the Process Server has reported that the family members of the defendant refused to put signature on the copy of the summon for the receipt of the plaint and documents etc and therefore, the Process Server had to adopt the mode provided for getting the service effected by affixing summons and relevant papers on the outer door of the residential house of the defendant. It is also pertinent to note here that the defendant at his own appeared in the Court not within 10 days of the service of the summons for judgment but much after 10 days. Therefore, in the above circumstances, the trial Court has appreciated the matter rightly in accordance with the provisions of Order 37 of the CPC. Further, the application moved by the defendant to grant him leave to defend the suit was containing two reasons. One reason was that though there was business dealing between the plaintiff and defendant but no amount was due against him and the other reason was denial of the cheque. It appears

that in business dealings, defendant issued 4 cheques. One of the cheques was of Rs.55,000/- and that bounced for the reason of insufficient amount in the account of defendant. Thus, in my humble opinion, it was essential for the defendant to show in the application that he had a triable issue and he was having a proper defence. In the said application, what has been stated is the simple denial to the claim made by the plaintiff while admitting the business transactions. Simple denial of the cheque in such a situation is not sufficient unless something more than that is placed on record.

In view of above, I do not find any merit in the contentions of the learned counsel for the appellant that the trial Court has committed an error of law in rejecting the application for grant of leave to defend the suit or that the trial Court has not properly proceeded in the matter as was required by it under Order 37 of the CPC. The provisions of Order 37 of the CPC clearly indicate that while considering the matters of granting

leave to defend, it is essential to see that there exists a defence which is reasonable and proper. In the circumstances when there is business transaction between the plaintiff and defendant and the defendant issued cheques to the plaintiff and subsequently the cheque on presentation was not honoured on account of insufficiency of amount then unless satisfactory reasons are there to explain as to how and in what circumstances the cheque was issued, the defendant cannot claim as a matter of right that he should be granted leave to defend the case. Mere denial is not sufficient for granting the leave.

The trial Court has considered the arguments which are being raised here and correctly rejected the application moved by the defendant-appellant.

The upshot of the forgoing discussions is that the learned trial Court has rightly refused the defendant-appellant the leave to defend suit and this answers the point framed for decision in

this appeal.

Resultantly, I do not find any merit in this appeal filed by defendant and the same is hereby dismissed.

(SATYA PRAKASH PATHAK)J.

/jpa